NOTICE:

THE FOLLOWING MOTION TO FILE AN AMICUS BRIEF OUT-OF-TIME WAS DENIED BY THE COURT ON MARCH 7, 1983 (51 LW 3649), BUT IS REPRODUCED HEREIN IN THE INTEREST OF COMPLETENESS.

No. 82-914

IN THE

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION

Respondent.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Seventh Circuit

MOTION BY THIRTY-NINE STATES AS AMICUS CURIAE FOR LEAVE TO FILE OUT OF TIME AMICUS BRIEF OPPOSING CERTIORARI

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MOTION BY THIRTY-NINE STATES AS AMICUS CURIAE FOR LEAVE TO FILE OUT OF TIME AMICUS BRIEF OPPOSING CERTIORARI

As instructed by the Clerk of the Court, the Attorneys General of the thirty nine states on whose behalf the Brief For Thirty Nine States As Amicus Curiae is herewith presented for filing hereby move for an extension of time within which to file the brief. The Amici States believe that an extension is justified under the circumstances of this proceeding for the reasons set forth below.

The Attorneys General of the Amici States are the chief law enforcement officers of their respective jurisdictions, and are charged by law with responsibility for the enforcement of state and federal antitrust laws. Because of their major enforcement

responsibilities, the Amici States have a substantial interest in the application and interpretation of the antitrust laws in a manner consistent with the Supreme Court's numerous decisions with respect thereto. Consequently, the Amici States were alarmed upon discovering on January 27, 1983, that the United States, in its amicus brief in support of Monsanto's petition for certiorari, proposed major revisions of the antitrust laws with respect to activities which have been regularly condemned by the Court as per se violations of the Sherman Act for over 70 years. The Amici States consider the respective contentions of Monsanto and the United States antithetical to effective enforcement of the antitrust laws, and inimical to numerous pending cases and investigations. In short, the amicus brief of the United States reflects profound differences between the

United States and the Amici States on basic antitrust policy, and proposes major revisions to the antitrust laws with which the Amici States disagree entirely.

Upon learning the nature of the United States' participation in this proceeding in support of Monsanto, the Amici States acted promptly and diligently in the preparation of the amicus brief. The undersigned counsel of record first learned of the filing of the United States' amicus brief on January 19, 1983. A copy of the brief was requested on January 20, and was received on January 27. A draft of the enclosed amicus brief was circulated to all states on February 9, and the final additions as amici were made on February 15. Circulation of the draft brief, and the completion of the states' internal administrative clearance procedures

necessary for participation on the brief, were slowed as a result of certain states' scheduling of a holiday in observance of Lincoln's birthday.

Although mindful of the fact that the prescribed period for the submission of an amicus brief has passed (Spray-Rite's opposition to the petition was filed on January 6; the amicus brief of the United States was filed on January 3), the Amici States believe that the Court should be apprised of their views regarding the petition and the position of the United States as an amicus. The participation of thirty nine states on the accelerated basis described above relects the magnitude of their concern regarding the respective positions of Monsanto and the United States herein,

and the adverse impact which those positions will have upon effective enforcement of the antitrust laws if accepted.

DATED: February 17, 1983.

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BRIEF FOR THIRTY-NINE STATES AS AMICUS CURIAE

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QUESTION PRESENTED

This distributor termination case presents a simple issue, involving no conflict between the circuits:

In light of evidence establishing, inter alia, that Monsanto received numerous complaints from its distributors regarding Spray-Rite's price-cutting practices, and requests from those distributors that Spray-Rite be terminated because of such practices, and that Monsanto, in each of the three years preceding Spray-Rite's termination threatened Spray-Rite with termination if it did not raise its prices, and subsequently did terminate Spray-Rite because of those complaints, was the Seventh Circuit correct in affirming the jury's conclusion that Monsanto engaged in a combination and conspiracy with its distributors for the purpose of fixing the distributors' resale prices, and pursuant to that conspiracy, terminated Spray-Rite because of its price-cutting practices.

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STATUTES:

I.
INTRODUCTION

The States of Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming, the Commonwealths of Kentucky, Massachusetts and Pennsylvania, and the District of Columbia (hereinafter the "Amici States") submit this brief in support of Respondent Spray-Rite's opposition to Monsanto's petition for a writ of certiorari.

II
IDENTITY AND INTEREST OF THE AMICI STATES

A. Identity Of Amici States

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states. As such, they are charged by law with responsibility for the enforcement of their respective states' antitrust laws, and of the federal antitrust laws.[1] In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of their natural citizens.[2] The Corporation Counsel for the District of Columbia has

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1 Pennsylvania does not have a state antitrust law. It does, however, play a major role in the enforcement of the federal antitrust laws.

2 15 U.S.C. § 15(c).

the same duties and authority with respect to the District of Columbia.

B. Interest Of The Amici States In This Case

Because of their major role in the enforcement of the antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and with this Court's numerous pronouncements with respect thereto.

Moreover, the states' antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws. See, e.g., People v. North Avenue Furniture & Appliance, 645 P.2d 1291 (Colorado 1982); Neyens v. Roth, ___N.W.2d___, 1982-83; CCH Trade Cases ¶ 65,060 (Iowa 1982); Grams v. Boss, 97 Wisc.2d 332, 294 N.W.2d 473

(Wisc. 1980); Marin County Bd. of Realtors v. Palsson, 130 Cal.Rptr. 1, 549 P.2d 833 (Calif. 1976); Pittsburg Plate Glass Co. v. Paine & Nixon Co., 234 N.W. 453 (Minn. 1931).

For these reasons the Amici States are deeply troubled by the contentions of Monsanto and the United States that Monsanto's conduct did not constitute a per se violation of the Sherman Act, and, more generally, that resale price maintenance schemes generically should not be treated as per se violations. These contentions are antithetical to the Amici States' interest in the effective enforcement of the antitrust laws, and are inimical to pending cases and investigations involving resale price maintenance schemes.

III
SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for the following reasons:

1. There is no conflict between the circuits regarding the standard of evidence necessary to support an inference of concerted action in distributor termination cases. All of the cases relied upon by Monsanto and the United States to identify and define the conflict require, as a prerequisite to such an inference, evidence of a causal relationship between distributors' complaints about a competing distributor and a manufacturer's subsequent termination of that distributor.

2. The evidence presented at trial clearly established that Monsanto engaged in a combination and conspiracy with its

distributors for the purpose of fixing the distributors' resale prices, and, pursuant to that conspiracy, terminated Spray-Rite because of its price-cutting practices. The Seventh Circuit properly affirmed the jury's conspiracy determination, and the district court's application of per se standards to Monsanto's price fixing conduct.

3. The use of certiorari in this case for the purpose of accomplishing the major revision of the law relating to resale price maintenance conspiracies proposed by the United States would be singularly inappropriate. The United States' ambitious proposal is wholly unsupported by the the evidence, and disregards seventy years of pronouncements by this Court and the Congress recognizing the pernicious effect of resale price maintenance schemes and condemning such activities as

per se violations of the Sherman Act. Moreover, the course proposed by the United States reflects a surprising insensitivity towards the respective roles of the Judiciary and the Congress in the formulation and application of the antitrust laws.

IV
ARGUMENT

A. There Is No Conflict Between Circuits Regarding The Standard Of Evidence In Distributor Termination Cases

Contrary to the assertions by Monsanto and the United States, there is no conflict between the circuits regarding the standard of evidence necessary to support an inference of concerted action between a manufacturer and its distributors in distributor termination cases. The decisions of the seven circuits relied upon by Monsanto and the United States to identify and define the alleged conflict all require, as a prerequisite to the inference of concerted action, evidence of a causal relationship between distributors' complaints regarding a competing distributor and a manufacturer's termination of that distributor.

The Seventh Circuit's decision below,[3] and the Eighth Circuit's decision in Battle v. Lubrizol Corp.,[4] the two decisions which Monsanto and the United States treat as inconsistent with the decisions of other circuits, both require this causal relationship. The Eighth Circuit stated that:

> [W]e conclude that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action in response to such complaints would be sufficient to raise an inference of concerted action. . . .A showing of responsive action on the part of the manufacturer is necessary; there must be evidence of a causal relationship between the competitor dealer's price-related complaints and the manufacturer's action.
>
> 673 F.2d at 991-992.

Having thus articulated the requirement of a causal relationship, the Eighth

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3 Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982).

4 673 F.2d 984 (8th Cir. 1982).

Circuit held as follows:

> We hold only that evidence of receipt by the manfacturer of a competitor dealer's price-related complaints and responsive action by the manufacturer against the offending dealer raises a reasonable inference of concerted action in violation of section 1 of the Sherman Act.
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> 673 F.2d at 992.

In its decision below, the Seventh Circuit quoted with approval the above portion of the Eighth Circuit's Battle decision, and held:

> . . . We agree. Proof of distributorship termination in response to competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action.
>
> 684 F.2d at 1239 (emphasis added.)

Thus, the Eighth Circuit in Battle expressly equated its "responsive action" language[5] with its "causal relationship"

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5 673 F.2d at 991-992 ("in response

language.[6] The Seventh Circuit subsequently relied upon that language and adopted the Battle standard as its own. Although the Seventh Circuit did not expressly refer to a causal connection, its requirement of "[p]roof of distributorship termination in response to competing distributors' complaints" can be read in no other way. A contrary reading would place unwarranted emphasis upon a trivial semantical distinction totally lacking in substance.

These requirements of a causal relationship by the Seventh and Eighth Circuits are entirely consistent with the decisions of the First,[7] Second,[8]

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to"; "responsive action").

6 Id, at 991-992.

7 Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853 (1st Cir. 1982).

8 H. L. Moore Drug Exchange v. Eli Lilly & Co., 662 F.2d 935 (2nd Cir. 1981); Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2nd Cir.

Third,[9] Sixth,[10] and Tenth Circuits[11] upon which Monsanto and the United States rely in their effort to define a conflict. Each of these cases requires a causal relationship between distributors' complaints and a manufacturer's termination as a prerequisite to an inference of concerted action.

The Third Circuit's decision in Sweeney & Sons was the first of the "conflict decisions" to set forth the requirement of a causal relationship:

> The necessary first step toward appellants' proof of a prohibited § 1 conspiracy was proof of a causal relationship between competitor complaints that Sweeney was selling Texaco

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1982), cert. denied, 51 U.S.L.W. 3362 (Nov. 9, 1982), petition for rehearing denied, 51 U.S.L.W. 3553 (Jan.25, 1983).

9 Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105 (3rd Cir. 1980).

10 Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190 (6th Cir. 1982).

11 Blankenship v. Herzfeld, 661 F.2d 840 (10th Cir. 1981).

> gasoline several cents below their own price and the reduction of Sweeney's hauling allowance. . . .The mere reception of complaints by Texaco would be insufficient to prove this causal nexus.
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> 637 F.2d at 111 (emphasis added).

The Second Circuit's decisions in Moore Drug Exchange and Schwimmer, while not expressly referring to a causal relationship, were nonetheless decided on those grounds. Thus, the court in Moore Drug Exchange held that:

> The central issue in this case is whether Moore was terminated pursuant to an illegal conspiracy between Lilly and one or more of its wholesalers to control resale prices and to restrict the territories in which Lilly products could be sold. . . . A unilateral refusal by Lilly to deal with the wholesaler, absent proof that it was pursuant to a conspiracy, does not violate §1 of the Sherman Act. . . . Moore could prevail only if it proved that its termination stemmed from 'a contract, combination or conspiracy' between Lilly and certain of its wholesalers.

> 662 F.2d at 941 (emphasis added).

This language was later quoted by the court in its decision in Schwimmer. 677 F.2d at 952-953.

Sweeney & Sons and Moore Drug Exchange were subsequently cited in the First Circuit's Bruce Drug decision in support of the Court's statement that:

> The mere existence of a number of complaints in a supplier's files, especially when a small number, is insufficient, without more, to sustain the inference that a dealer was terminated because of them, or because of a conspiracy.
>
> 688 F.2d at 856 (emphasis added.)

The last of the "conflict cases" relied upon by both Monsanto and the United States is the Sixth Circuit's decision in Davis-Watkins. That decision established a causal connection requirement as follows:

> There is no evidence that would

> establish dealer coercion causing Amana to act otherwise than consistent with its market strategy. SMC has not submitted any evidence that Amana's distributors or dealers acted jointly. Complaints to Amana by its distributors and dealers concerning SMC's low prices and lack of services does not establish a causal relationship between such complaints and Amana's imposed restrictions.
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> 686 F.2d at 1199 (emphasis added).

Finally, the Tenth Circuit's decision in Blankenship, relied upon only by Monsanto,[12] requires the same causal relationship:

> However, for HOM to prevail, it still must show that the termination was 'the result of pressure from another customer,' rather than 'a manufacturer act[ing] on its own in pursuing its own market strategy'.
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> 661 F.2d at 844.

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12 With respect to Monsanto's apparent uncertainty regarding the identity of the cases defining the alleged conflict between the circuits, see Respondent's Brief In Opposition at page 24.

Monsanto and the United States simply fail to recognize the element that consistently emerges from these cases - the requirement of a causal relationship between distributors' complaints about a competing distributor and a manufacturer's termination of that distributor. There is no conflict between the circuits.

B. Monsanto Engaged In A Classic Resale Price Maintenance Conspiracy, And Its Actions Were Properly Judged By Per Se Standards

It is readily apparent from the record[13] that Monsanto engaged in a classic resale price maintenance conspiracy, and that its actions were properly subject to per se standards of

13 Respondent's Brief In Opposition sets forth the evidence upon which the jury's decision was based at pages 1 through 12 and page 18, note 11. See also the Seventh Circuit's decision. Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, at 1232-1240 (1982).

liability under Section 1 of the Sherman Act. The evidence established, inter alia, that Monsanto received numerous complaints from distributors regarding Spray-Rite's price-cutting practices, and requests from those distributors that Spray-Rite be terminated because of such practices; that Monsanto, in each of the three years preceding its termination of Spray-Rite, threatened Spray-Rite with termination if it did not raise its prices; and that Monsanto subsequently did terminate Spray-Rite because of the distributors' complaints.[14] In light of this evidence, the Seventh Circuit was entirely correct in affirming the jury's

14 Monsanto effectuated the termination by refusing to renew Spray-Rite's one-year, self-terminating distributor's contract. As the Seventh Circuit correctly noted, there is no functional distinction between the terms "refuse to renew" and "terminated" in the context of this resale price maintenance conspiracy. 684 F.2d at 1233, n.2.

conclusion that Monsanto engaged in a combination and conspiracy with its distributors for the purpose of fixing the distributors' resale prices, and that Monsanto terminated Spray-Rite pursuant to that conspiracy because of Spray-Rite's price-cutting practices.

That such conduct constitutes a per se violation of the Sherman Act can hardly be gainsaid. Resale price maintenance conspiracies have been regularly proscribed as per se violations by this Court for more than seventy years. California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); United States v. Line Material Co., 333 U.S. 287 (1948); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. A. Schrader's Son, 252 U.S. 85 (1920); United States v. Colgate & Co., 250 U.S. 300 (1919);

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911). Moreover, Congress recently expressed its approval of the per se treatment of such activities by repealing those provisions of the Miller - Tydings Act which had previously allowed resale price maintenance at the option of the individual states through the enactment of state fair trade laws.[15]

The evidence of concerted action presented to the jury clearly removed this case from the narrow bounds of permissible behavior under the Colgate doctrine. As this Court observed in A. Schrader's Son:

> It seems unnecessary to dwell upon the obvious difference between the

15 Consumer Goods Pricing Act of 1975, 89 Stat 801, amending 15 U.S.C. § 1, 45(a). See also, California Liquor Dealers, 445 U.S. at 102-103; Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 (1977) (note 18).

> situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements--whether express or implied from a course of dealing or other circumstances . . . which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers, and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs, and thereby destroy competition and restrain the free and natural flow of trade amongst the states.

252 U.S. at 99-100.

This Court's decisions proscribing resale price maintenance conspiracies as per se violations simply reflect the fact that:

> In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that

> certain agreements or practices are so 'plainly anticompetitive,' . . .and so often 'lack. . .any redeeming virtue,' . . .that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.
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> Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 646 (1980).

The curious reliance by Monsanto and the United States upon Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), is unavailing. This Court expressly removed resale price maintenance conspiracies from the scope of that decision:

> As in Schwinn, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. . . .[U]nlike nonprice restrictions, '[r]esale price maintenance is not only

> designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands.'. . .

433 U.S. at 51, note 18.

C. The Use Of Certiorari In This Case To Accomplish A Sweeping Revision Of The Law Relating To Resale Price Maintenance, As Proposed By The United States, Would Be Entirely Inappropriate

It is unlikely that any case would justify the course suggested by the United States - that "the Court should grant review in this case to consider whether all vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason."[16] This case, at least, does not.

The United States' ambitious attempt at a sweeping revision of the law is dubious for a number of reasons. First,

16 Brief For The United States As Amicus Curiae, p. 13.

it ignores entirely the evidence upon which the jury found a resale price maintenance conspiracy between Monsanto and its distributors, and upon which the Seventh Circuit affirmed. Second, it disregards the seventy years of experience with resale price maintenance schemes in light of which this Court and the Congress have regularly condemned such activities as per se violations of the Sherman Act. Finally, it reflects insensitivity towards the respective roles of the Judiciary and the Congress in the formulation and application of the antitrust laws with respect to per se activities, i.e., those whose nature and necessary effect are so plainly anticompetitive that no study of the industry is needed to establish their illegality.[17] As this Court recently

17 See National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

explained:

> Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. . . . Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the legislature. . .
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> Arizona v. Maricopa County Medical Society, 73 L.Ed.2d 48, 65 (1982).

Revisions involving major policy considerations of great significance to this country's "economic bill of rights" require legislative action. Arizona v. Maricopa County Medical Society, 73 L.Ed.2d 48, 65 (1982). Amicus

appearances before this and other courts are an inappropriate way to attempt revisions of this magnitude.

The efforts of the United States are particularly disturbing to the Amici States because of their largely co-extensive responsibility for enforcement of the antitrust laws. The revisionism proposed by the United States reflects profound differences between the United States and the Amici States on basic antitrust policy, and proposes a lesser standard for judging resale price maintenance activities with which the Amici States disagree entirely.

V
CONCLUSION

The Amici States respectfully submit that the petition for a writ of certiorari should be denied.

Dated: February 15, 1983

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